Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	)))))	MB Docket No. 05-311

REPLY COMMENTS OF THE CITY OF PHILADELPHIA, PENNSYLVANIA, CITY OF OKLAHOMA CITY, OKLAHOMA; CITY OF MINNEAPOLIS, MINNESOTA; NORTHWEST SUBURBAN CABLE COMMUNICATIONS COMMISSION; CITY OF SIOUX FALLS, SOUTH DAKOTA; NORTH METRO TELECOMMUNICATIONS COMMISSION; NORTH SUBURBAN COMMUNICATIONS COMMISSION; THE SOUTH WASHINGTON COUNTY TELECOMMUNICATIONS COMMISSION; CITY OF RENTON, WASHINGTON; CITY OF EDMOND, OKLAHOMA; CITY OF COON RAPIDS, MINNESOTA; CITY OF WEST ALLIS, WISCONSIN; TOWN OF PERINTON, NEW YORK; CITY OF URBANDALE, IOWA; CITY OF EDMONDS, WASHINGTON; TOWN OF PITTSFORD, NEW YORK; CITY OF MAPLE VALLEY, WASHINGTON; CITY OF WATERTOWN, WISCONSIN; VILLAGE OF OREGON, WISCONSIN; AND CITY OF NEW LONDON, WISCONSIN

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SUMMARY

The FNPRM should be rejected because it is unsupported by public policy and has no legal basis. The above-referenced municipal entities (the "LFAs") submitted Initial Comments[1] in response to the FCC's Second Further Notice of Proposed Rulemaking[2] and respectfully submit these Reply Comments. These Reply Comments primarily address arguments raised by several Comments submitted by the cable industry (collectively, the "Industry Comments").[3]

In the FNPRM, the FCC has proposed a new interpretation of how cable franchise fees are calculated by allowing cable operators to include nearly all in-kind franchise provisions.[4] Contrary to the Industry Comments, the LFAs along with many other commenters and many Congress Members believe such an action would create a "lose-lose" proposition and fails to recognize the many public benefits brought by in-kind franchise provisions.

The FNPRM and the Industry Comments also fail to present evidence showing that in-kind franchise provisions are assessments imposed on cable operators and therefore franchise fees under Section 622. While the Industry Comments summarily refer to such in-kind provisions as "exactions," they fail to show how they are exactions. The LFAs' have shown in-kind provisions are either willingly negotiated in informal cable franchise negotiations or

[1] *See* Initial Comments of the City of Philadelphia, Pennsylvania *et al*., MB Docket No. 05-311 (Nov. 14, 2018) (herein "Initial Comments").
[2] *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Further Notice of Proposed Rulemaking, MB Docket No. 05-311 (Sep. 25, 2018) (herein ("FNPRM").
[3] *See* Comments of NCTA – The Internet and Television Association, MB Docket No. 05-311 (Nov. 14, 2018) (herein "NCTA Comments"); Comments of the American Cable Association on the Second Further Notice of Proposed Rulemaking, MB Docket No. 05-311 (Nov. 14, 2018) (herein "ACA Comments"); Comments of Verizon, MB Docket No. 05-311 (Nov. 14, 2018) (herein "Verizon Comments") (collectively referred to herein as the "Industry Comments" or the "Industry Commenters.").
[4] *See* Initial Comments at pp. 19-43.

proposed by cable operators as part of the formal cable renewal process. Either way, in no way are in-kind provisions "exacted" like a civil forfeiture. Because of this, the reliance on the *Montgomery County* decision is misplaced as that decision indicated that only "in-kind exactions" like civil forfeitures *could* be an assessment and thus part of a franchise fee.

The Industry Comments selectively cite to the sparse legislative history that exists on Section 622 of the Cable Act and therefore read the legislative history out of context. The LFAs have shown again that the legislative history though sparse supports the LFAs' position that franchise fees are monetary in nature and do not include in-kind franchise provisions. Any reading to the contrary would render other provisions of the Cable Act meaningless. The LFAs further have shown that any action by the FCC would have no positive impact on broadband deployment. In reality, the FCC's proposed actions may hinder broadband deployment since local franchising authorities have already negotiated for build-out to unserved areas of their communities, and the FCC is effectively proposing to eliminate these bargained-for franchise requirements.

Next, the Reply Comments address mixed-use networks. The LFAs recap and elaborate their argument in the Initial Comments that the FCC's proposed mixed use ruling is based on an invalid inference, from the "common carrier exception" in Section 602(7)(C) of the Cable Act, to the proposition that an incumbent cable operator's cable system is not subject to LFA regulation if it carries non-cable services as well as cable service. The LFAs argue that the FCC ignores both the legislative history of the Cable Act, and the difference between Title II's focus on services and Title VI's focus on cable systems as the locus of local regulatory authority. As a result, the FCC incorrectly applies the "common carrier exception" in Section 602(7)(C), which is the crux of its argument that incumbent cable systems are exempt from LFA regulation to the

extent they carry non-cable services. The LFAs then examine the industry's position, as stated in NCTA's Comments, that multiple sections of the Cable Act preempt LFA regulation of cable systems altogether, including their occupancy of the public rights of way, and including regulation founded in sources of local authority other than the Cable Act. The LFAs show that in fact the provisions NCTA relies on do not support the broad and categorical preemption NCTA asks the FCC to adopt.

Finally, the Reply Comments address state franchising actions and regulations. Although the Commission does not possess the authority necessary to enact regulations as proposed in the FNRPM, the Industry Comments suggest that validly enacted federal regulations would somehow be subservient to state and local law and that the FCC must expressly preempt states for any regulations to take effect.[5] The Industry Comments similarly suggest, 34 years after the Cable Communications Policy Act of 1984's (herein "Cable Act") passage, that only at this particular point in time do disparate state regulations, which existed prior to and are expressly undisturbed by the Cable Act, impose an undue regulatory burden. These bald assertions by the Industry Comments are wholly unsupported and do not otherwise cure the FNRPM's legal deficiencies previously identified in the Initial Comments.[6]

The LFAs request that the FCC decline to adopt the proposed rules in the FNRPM.

[5] *See* U.S. CONST. art. vi., cl. 2.
[6] Initial Comments at pp. 51-56.

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I. INTRODUCTION

The above-referenced municipal entities[7] submitted Initial Comments in response to the

[7] The municipal entities are in order of population size constituting 46 municipal organizations from the states of Iowa, Minnesota, New York, Oklahoma, Pennsylvania, South Dakota, Washington, and Wisconsin, with a collective population of approximately 3.8 million (individual municipal populations in parentheticals): City of Philadelphia, Pennsylvania (1,580,863); City of Oklahoma City, Oklahoma (579,999); City of Minneapolis (382,578); Northwest Suburban Cable Communications Commission (collective population 317,272) (a Minnesota municipal joint powers commission consisting of the Minnesota cities of Brooklyn Center (30,104), Brooklyn Park (75,781), Crystal (22,141), Golden Valley (20,371), Maple Grove (61,567), New Hope (20,339), Osseo (2,430), Plymouth (70,576), and Robbinsdale (13,953)); City of Sioux Falls, South Dakota (153,888); North Metro Telecommunications Commission (collective population 109,779) (a Minnesota municipal joint powers commission consisting of the Minnesota cities of Blaine (57,186), Centerville (3,792), Circle Pines (4,918), Ham Lake (15,296), Lexington (2,049), Lino Lakes (20,216), and Spring Lake Park (6,412)); North Suburban Communications Commission (collective population 106,991) (a Minnesota municipal joint powers commission consisting of the Minnesota cities of Arden Hills (9,552),

FCC's Second Further Notice of Proposed Rulemaking[8] and respectfully submit these Reply Comments.[9] The LFAs endorse and support the many comments submitted by local franchising authorities in opposition to FCC's proposed rulemaking.[10] These Reply Comments primarily address arguments raised by several cable industry Comments.[11]

II. REPLY COMMENTS

A. In-Kind Franchise Provisions Are Not Franchise Fees

1. Benefits to the Public – Not Cable Operator Margins – Should Dictate Public Policy.

In-kind franchise provisions negotiated and/or proposed by cable operators have benefited the public in many ways. The proposed rulemaking by the FCC allowing cable operators to deduct or eliminate the value of in-kind franchise provisions by setting it off against

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Falcon Heights (5,321), Lauderdale (2,379), Little Canada (9,773), Mounds View (12,155), New Brighton (21,456), North Oaks (4,469), Roseville (33,660), and St. Anthony (8,226)); South Washington County Telecommunications Commission (collective population 105,571) (a Minnesota municipal joint powers commission consisting of the Minnesota municipalities of Woodbury (61,961), Cottage Grove (34,589), Newport (3,435), Grey Cloud Island Township (307), and St. Paul Park (5,279), Minnesota); City of Renton, Washington (population 90,927); City of Edmond, Oklahoma (population 81,405); City of Coon Rapids, Minnesota (61,476); City of West Allis, Wisconsin (60,411); Town of Perinton, New York (46,462); City of Urbandale, Iowa (39,463); City of Edmonds, Washington (39,709); Town of Pittsford, New York (population 29,405); City of Maple Valley, Washington (population 25,758); City of Watertown, Wisconsin (23,861); Village of Oregon, Wisconsin (9,231); and City of New London, Wisconsin (7,295).(collectively, the "LFAs").

[8] FNRPM.

[9] *See* Initial Comments.

[10] *See, e.g.*, Comments of the National Association of Telecommunications Officers and Advisors *et al*., MB Docket No. 05-311 (Nov. 14, 2018) (herein "NATOA Comments"); Comments of Anne Arundel County, Maryland *et al*., MB Docket No. 05-311 (Nov. 14, 2018) (herein "Anne Arundel County *et al*. Comments"); Comments on Second Further Notice of Proposed Rulemaking of the Alliance for Communications Democracy *et al*., MB Docket No. 05-311 (Nov. 14, 2018) ("The Alliance for Communications Democracy ('ACD'); the Alliance for Community Media ('ACM'); and the Cities of Bowie, Maryland; Eugene, Oregon; Palo Alto, California; and Portland, Maine (collectively, Cable Act Preservation Alliance ('CAPA')), submit these comments in response to the Commission's Second Further Notice of Proposed Rulemaking ('Second FNPRM') in this docket.") (herein "CAPA Comments").

[11] *See* NCTA Comments; ACA Comments; Verizon Comments.

the franchise fee will significantly alter or even eliminate many of these important benefits to the public.[12] Many members of Congress recognize these benefits and have urged the FCC to take no action to disturb these public benefits.[13] The result of FCC action as proposed in the FNPRM will be a "lose-lose" proposition that "will result in a dire drop in resources for PEG channels throughout the nation"[14] among other public benefits. The Initial Comments, many other Commenters, and Congress Members identified many of these public benefits, including:

- Access to locally relevant information such as candidate profiles prior to elections, city council and school board meetings, and high school sporting events;[15]

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[12] *See* Exhibit A, Declaration of Thomas G. Robinson at D.3. *See also* Comments of the City and County of Denver, MB Docket No. 05-311 (Nov. 14, 2018); Comments of City of Lansing, Michigan, MB Docket NO. 05-311 (Nov. 14, 2018); Julie Zeglen, This FCC rule change could put funding for public access TV at risk, GENEROCITY (Dec. 12, 2018) ("There is a very real possibility that PEG operators like PhillyCAM will see other negative consequences, such as the reduction or elimination of public access television channels."), *available at* https://generocity.org/philly/2018/12/12/this-fcc-rule-change-would-cut-public-access-dollars-heres-how-phillycam-is-responding/.

[13] *See* U.S. Rep. Mark Pocan, *Letter to Chairman Pai* (Dec. 12, 2018) ("Under [the FCC's] proposed rule, I am concerned that if Wisconsin municipalities also have to pay for the PEG channels themselves, it would force nearly all cities to abandon their channels for lack of funds."); U.S. Rep. Peter Welch & U.S. Rep. Chellie Pingree, *Letter to Chairman Pai* (Dec. 6, 2018), *available at* http://files.constantcontact.com/5a368357301/0df063a8-bf68-4068-aa1e-2c5d5a4d4452.pdf ; U.S. Senator Edward J. Markey, U.S. Senator Tammy Baldwin, U.S. Senator Margaret W. Hassan, U.S. Senator Benjamin L. Cardin, U.S. Senator Jeffrey A. Merkley, U.S. Senator Barnard Sanders, U.S. Senator Gary C. Peters, U.S. Senator Ron Wyden, U.S. Senator Patrick Leahy, U.S. Senator Richard Blumenthal, U.S. Senator Elizabeth Warren, *Letter to the Honorable Ajit V. Pai* (Oct. 29, 2018), *available at* https://www.markey.senate.gov/imo/media/doc/FCC%20Franchise%20Fee%20Proposal.pdf.

[14] *See* U.S. Senator Edward J. Markey, U.S. Senator Tammy Baldwin, U.S. Senator Margaret W. Hassan, U.S. Senator Benjamin L. Cardin, U.S. Senator Jeffrey A. Merkley, U.S. Senator Barnard Sanders, U.S. Senator Gary C. Peters, U.S. Senator Ron Wyden, U.S. Senator Patrick Leahy, U.S. Senator Richard Blumenthal, U.S. Senator Elizabeth Warren, *Letter to the Honorable Ajit V. Pai* (Oct. 29, 2018), *available at* https://www.markey.senate.gov/imo/media/doc/FCC%20Franchise%20Fee%20Proposal.pdf.

[15] *See* H.R. Rep. No. 98-934, 1984 U.S.C.C.A.N. 4655, 4667 (herein "Cable Act House Report"). *See* NATOA Comments at p. 10; Anne Arundel County *et al*. Comments at pp. 28-29; CAPA Comments at p. 9; Comments of the Iowa League of Cities, MB Docket No. 05-311 (Nov. 14, 2018); Comments of the Philadelphia Community Access Corporation, MB Docket No. 05-311 (Nov. 14, 2018); Comments of the Manhattan Community Access Corporation, MB Docket No. 05-311 (Nov. 14, 2018); Comments of the City of New York at p. 8, MB Docket No.

- Multi-platform access to locally relevant programming;[16]
- Fair and responsible public rights-of-way management to ensure safe access for the public;[17]
- Discounts for senior citizens and disabled citizens benefit some of the most vulnerable citizens of the LFAs;[18]
- Institutional networks allow municipalities to provide services and communicate effectively with its citizens;[19]
- Electronic Programming Guide Service;[20]

05-311 (Nov. 14, 2018); Comments of the City of Arlington, Texas, MB Docket No. 05-311 (Nov. 14, 2018); Comments of King County, Washington at p. 8, MB Docket No. 05-311 (Nov. 14, 2018); Comments of Mississippi Municipal League, MB Docket No. 05-311 (Nov. 14, 2018); Comments of Alabama League of Municipalities, MB Docket No. 05-311 (Nov. 13, 2018); Comments of City of Burnsville, Minnesota, MB Docket No. 05-311 (Nov. 13, 2018). *See also* Dan Kennedy, *Is Community Access TV on the FCC Chopping Block*, WGBH NEWS (Nov. 28, 2018), https://www.wgbh.org/news/commentary/2018/11/28/is-community-action-tv-on-the-fcc-chopping-block ("What's at stake if the FCC has its way, says CCTV's Fleischmann, is 'the elimination or curtailment of one of the few remaining non-commercial free speech media platforms.'"); Jim Dayton, *JATV could be forced off cable if FCC proposal becomes law*, GAZETTE XTRA (Dec. 10, 2018), *available at* https://www.gazettextra.com/news/government/jatv-could-be-forced-off-cable-if-fcc-proposal-becomes/article_44a84ed2-bb2e-5969-a5da-e330750652b8.html.

[16] *See, e.g.*, North Metro Telecommunications Commission, *North Metro TV Live Stream*, *available at* https://northmetrotv.com/channel-15-live/; West Allis, Wisconsin, *YouTube City Channel*, *available at* https://www.youtube.com/user/westalliscitychannel.

[17] *See* Cable Act House Report at 4696. *See, e.g.*, Philadelphia, Pennsylvania, *Cable Franchise Agreement Between City of Philadelphia and Comcast of Philadelphia, LLC, Comcast of Philadelphia II, LLC* (2015), *available at* https://phila.legistar.com/View.ashx?M=F&ID=4160967&GUID=CFA9C658-6CBE-4521-BAF1-6A3F47C06C25; Comments of King County, Washington at pp. 9-10, MB Docket No. 05-311 (Nov. 14, 2018).

[18] *See* NATOA Comments at p. 10; Anne Arundel County *et al*. Comments at p. 26; Comments of King County, Washington at p. 8, MB Docket No. 05-311 (Nov. 14, 2018). *See, e.g.*, Renton, Washington, *Cable Franchise Agreement Between City of Renton, Washington and Comcast Cable Communication Management, LLC and Comcast Cable Holdings, LLC* at § 5.3 (2014), *available at* https://renton.civicweb.net/filepro/document/34953/Comcast%20ORD.pdf.

[19] *See* CAPA Comments at p. 13; Comments of City of Burnsville, Minnesota, MB Docket No. 05-311 (Nov. 13, 2018). *See, e.g.*, North Suburban Communications Commission, *Staff Report on CenturyLink Cable Franchise Application* (Apr. 9, 2015), *available at* https://ctvnorthsuburbs.org/content/pdfs/CenturyLink/1StaffReport20150409(FINAL).pdf.

[20] *See* NATOA Comments at p. 10; Anne Arundel County *et al*. Comments at pp. 28-29; CAPA Comments at p. 9; Comments of the Iowa League of Cities, MB Docket No. 05-311 (Nov. 14, 2018); Comments of the Philadelphia Community Access Corporation, MB Docket No. 05-311 (Nov. 14, 2018); Comments of the Manhattan Community Access Corporation, MB Docket No. 05-311 (Nov. 14, 2018); Comments of the City of New York at p. 8, MB Docket No. 05-311 (); Comments of the City of Arlington, Texas, MB Docket No. 05-311 (Nov. 14, 2018); Comments

- HD/SD Access Channels for public, educational and governmental programming;[21]
- Coverage of local high school sports and other activities;[22]
- Coverage of events of local significance;[23]
- Closed captioning for viewers with disabilities;[24]
- Customer service provisions including provisions requiring local customer service locations benefit cable subscribers giving them the ability to quickly address customer services questions and complaints;[25]
- Customer service centers physically located in the community; and[26]
- Build-out requirements to unserved areas.[27]

In our view, these public benefits are more valued by the public than the alleged reduction in a cable operator's margins as urged in the Industry Comments.[28] One Industry Commenter went so far as to argue that a cable operator's internal operating costs be included in a franchise fee![29] Under the current rules, Cable operator margins are reportedly quite healthy.[30] Public policy, to the extent it is relevant, supports the LFAs' position that in-kind franchise provisions do not fall

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of King County, Washington at p. 8, MB Docket No. 05-311 (Nov. 14, 2018); Comments of Mississippi Municipal League, MB Docket No. 05-311 (Nov. 14, 2018); Comments of Alabama League of Municipalities, MB Docket No. 05-311 (Nov. 13, 2018); Comments of City of Burnsville, Minnesota, MB Docket No. 05-311 (Nov. 13, 2018).

[21] *See supra* at n. 16.

[22] *See supra* at n. 16.

[23] *See supra* at n. 16.

[24] *See supra* at n. 16.

[25] *See* Comments of Mississippi Municipal League, MB Docket No. 05-311 (Nov. 14, 2018); Comments of Alabama League of Municipalities, MB Docket No. 05-311 (Nov. 13, 2018). *See, e.g.*, Renton, Washington, *Cable Franchise Agreement Between City of Renton, Washington and Comcast Cable Communication Management, LLC and Comcast Cable Holdings, LLC* at § 5.3 (2014), *available at* https://renton.civicweb.net/filepro/document/34953/Comcast%20ORD.pdf.

[26] *See* NATOA Comments at p. 10.

[27] *See* Anne Arundel County *et al*. Comments at p. 28.

[28] *See* ACA Comments at p. 9.

[29] *See* ACA Comments at p. 8.

[30] *See, e.g.*, Charter Communications, Inc., Form 10-K (2017) (reporting a 43.4% increase in revenue from 2016 to 2017), *available at* https://ir.charter.com/static-files/846b7951-583a-4ede-a45f-b985f46cc9b6; Comcast Corporation, Form 10-K (2017) (reporting a year-over-year increase in revenue for every year from 2013 to 2017, including a 161.2% increase in net income from 2016 to 2017), *available at* https://www.cmcsa.com/static-files/111ba611-eb85-4edc-9000-3907c84697d8.

under the definition of franchise fees under Section 622 of the Cable Act, or in the alternative, should be valued at the cable operator's actual incremental cost.

2. In-Kind Franchise Provisions Are Negotiated or Proposed by the Cable Operator And Therefore Cannot Be "Exactions."

The Industry Comments all summarily refer to in-kind provisions as "in-kind exactions,"[31] however none of the industry commenters, or the FCC in the FNPRM, provided any evidence that would support such a classification. In contrast, the LFAs showed in their Initial Comments that the negotiated in-kind provisions are not exactions.[32] Thus, there is no evidence before the FCC that negotiated in-kind provisions are exactions. Negotiated in-kind provisions are not exacted and are therefore not franchise fees because such provisions are not an assessment imposed on a cable operator.

The NCTA listed a handful of examples of "recent demands" and "requirements" of local governments.[33] "Recent demands" in no way reaches the level of an exaction. Under the Cable Act, cable franchise renewal agreements are negotiated either informally through typical contract negotiations or through the formal cable franchise renewal process identified in the Cable Act.[34] Well over 99 percent of cable franchises are reached through informal contract negotiations.[35]

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[31] *See* Comments of NCTA – The Internet and Television Association at pp. 41, 43, 47, 51, 52 & 55, MB Docket No. 05-311 (Nov. 14, 2018) (herein "NCTA Comments"); Comments of the American Cable Association on the Second Further Notice of Proposed Rulemaking at pp. 4 & 6, MB Docket No. 05-311 (Nov. 14, 2018) (herein "ACA Comments").

[32] *See* Initial Comments of the City of Philadelphia, Pennsylvania *et al*. at pp. 21-26, MB Docket No. 05-311 (Nov. 14, 2018) (herein "Initial Comments"). *See also, e.g.*, Phone Recovery Services, LLC v. Qwest Corp., No. A17-0078 (Minn. Oct. 31, 2018) (citing Minn. Stat. § 645.44, subd. 19).

[33] *See* NCTA Comments at pp. 43-45.

[34] *See* Cable Communications Policy Act of 1984 at § 626, Pub. L. 98-549, 98 Stat. 2779, 2791 (1984), *amended by* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992), *amended by* Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (herein "Cable Act").

[35] *See* Exhibit A, Declaration of Thomas Robinson at C.1.

In only a very few jurisdictions over the past 34 years has a cable franchise renewal been determined using the formal process.[36] The terms resulting from informal contract negotiations require both parties to agree to the terms and conditions. Under no circumstance, could such bargained-for terms be considered exactions. Indeed, cable operators routinely acknowledge the renewal process as the negotiation of a "mutually satisfactory agreement."[37]

Nor can the terms of a cable franchise resulting from following the formal process in Section 626 be considered exactions.[38] The Cable Act contemplates that a local franchising authority will identify its needs and the make a request for renewal proposal from the franchised cable operator.[39] The cable operator then makes a *proposal* to the local franchising authority that is either accepted or denied.[40] Again, nothing in the formal renewal process would suggest that a cable operator's franchise renewal proposal terms are an exaction of any kind. The decision to renew a cable franchise is based on the *proposal* of the cable operator.[41] If there is a preliminary assessment that a franchise should not be renewed, the cable operator is afforded fair opportunity for full participation in an administrative proceeding to determine if the cable operator's *proposal* is reasonable to meet the future cable-related community needs and interests, taking into consideration the cost of meeting such needs and interests.[42] If dissatisfied with the administrative proceeding, the cable operator may seek judicial review.[43] Nothing in the formal renewal process allows a local franchising authority to take any type of action that resembles a

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[36] *See* Exhibit A, Declaration of Thomas Robinson at C.1. *See, e.g.*, *Comcast of California II, L.L.C. v. City of San Jose, California*, 286 F.Supp.2d 1241 (N.D. Cal. 2003).
[37] *See* Exhibit A, Declaration of Thomas Robinson at Appendix 5. Cable Operator Letter to the North Metro Telecommunications Commission.
[38] *See* Exhibit A, Declaration of Thomas Robinson at C.
[39] *See* Cable Act at § 626. *See* Exhibit A, Declaration of Thomas Robinson at B.
[40] *See* Cable Act at § 626(b-d).
[41] *Id*.
[42] *See* Cable Act at § 626(c)(2).
[43] *See* Cable Act at § 626(e).

civil forfeiture or exaction.

The Northern Dakota County Cable Communications Commission ("NDC4") was cited as making "recent demands."[44] On closer examination however, NDC4 was merely identifying its needs as part of the formal cable franchise renewal process, just as Congress intended when it passed the Cable Act.[45] The cable operator, pursuant to the Cable Act, has the opportunity to make a *proposal* in response to these identified needs.[46] Just because needs are identified that a cable operator doesn't like doesn't equate to a local government making "exactions" or "circumventing" or "evading" provisions in the Cable Act.

NCTA also referred to unnamed franchises in Minnesota requiring free cable service to certain government buildings and community gathering spaces as "recent demands."[47] Since there have been no franchises entered into in Minnesota from the completion of a formal renewal process in the past 20 years, these "recent demands" are really just recent contract terms negotiated by a cable operator in a cable franchise.[48] The five franchises in New York City, the Montgomery County, Maryland, Hopkinsville, Kentucky and the Ramsey/Washington (Minnesota) cable franchises referenced by NCTA are similar situations.[49] These franchises were ultimately the result of informal cable franchise negotiations and resulted in franchise terms

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[44] *See* NCTA Comments at p. 43.
[45] *See* Northern Dakota Cable Communications Commission, Community Needs Ascertainment (Sep. 9, 2014), *available at* https://www.townsquare.tv/sites/default/files/documents/Exhibit%20C%20-%20Community%20Needs%20Report.pdf.
[46] *See* Cable Act at § 626(a)(1).
[47] *See* NCTA Comments at p. 43.
[48] In other instances, it would appear that NCTA is simply airing dirty laundry on behalf of its members. For example, litigation over what is included in a cable operator's gross revenues has no bearing on the matter at hand. Particularly the determination of non-subscriber revenue which has already been found to part of a cable operator's gross revenues. *See The City of Pasadena, California, the City of Nashville, Tennessee, and the City of Virginia Beach, Virginia*, 16 F.C.C. Rcd. 18192 (2001); NCTA Comments at p. 45.
[49] *See* NCTA Comments at pp. 44-45.

and conditions all as contemplated by Congress in the Cable Act. Again, negotiated and proposed terms by the cable operator are hardly exactions by a local franchising authority. Simply labeling these provisions as "exactions," as the Industry Commenters (and the FCC in the FNPRM) have done, does not make them "exactions."

3. *Montgomery County's* "In-Kind Exactions" Statement Provides No Support for the FCC's Tentative Determination to Treat Negotiated In-Kind Provisions as Franchise Fees.

The Industry Comments relied heavily on following the *Montgomery County* decision in support of the FCC's tentative conclusion that negotiated in-kind provisions should be considered franchise fees.[50] However, in the Initial Comments the LFAs showed the *Montgomery County* decision was limited to in-kind exactions.[51] In *Montgomery County*, the court of appeals stated that "in-kind exactions," similar to the civil forfeiture takings in the U.S. Supreme Court decision in *Austin*, could be defined as assessments and therefore *possibly* a franchise fee (i.e. an imposed assessment).[52] As shown above and in the Initial Comments, in the context of cable franchise renewals, the negotiated or proposed in-kind provisions at issue have no relation to the in-kind exactions in *Austin* (i.e., civil forfeitures).[53] Furthermore, other courts have defined an "exaction" as something unilateral in nature (i.e., an "exaction" is something not subject to bilateral negotiation).[54] Therefore, *Montgomery County* and *Austin*

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[50] *See* ACA Comments at pp. 3-4; Comments of Verizon at p. 5, MB Docket No. 05-311 (Nov. 14, 2018) (herein "Verizon Comments").
[51] *See* Initial Comments at pp. 23-26.
[52] *See* Initial Comments at pp. 23-24.
[53] *See* Initial Comments at p. 24.
[54] *See Atl. & Pac. Tel. Co. v. City of Philadelphia*, 190 U.S. 160, 165 (1903) (equating an "exaction" to a "tax"); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (equating an "exaction" to a penalty and therefore a tax); *W. Union Tel. Co. v. State of Kansas ex rel. Coleman*, 216 U.S. 1 (1910); *Page v. Lexington Cty. Sch. Dist. One*, 531 F.3d 275, 280 (4th Cir. 2008) (citing *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005)); *Diginet, Inc. v. W. Union ATS, Inc.*, 958 F.2d 1388, 1399–400 (7th Cir. 1992) ("The City cites cases that hold

provide no support for the Industry Comments or the FCC's tentative determination on including negotiated in-kind provisions as franchise fees. Cable franchise in-kind provisions are neither assessed nor imposed. Rather, in-kind provisions are negotiated or proposed by the cable operator and do not fall under the definition of franchise fees in the Cable Act.

4. Through the Cable Act, Congress Anticipated that In-Kind Provisions Would be Negotiated and/or Proposed by Cable Operators.

As described above, Congress, through Section 626 of the Cable Act, anticipated that local communities would identify their cable-related needs and interests which in turn would result in the negotiation and/or the proposal by cable operators to provide certain in-kind provisions.[55] Contrary to the Industry Comments, this process is by no means an attempt to "evade" or "circumvent" the franchise fee cap or an attempt to act contrary to the Cable Act in

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merely that a municipality's franchisee cannot attack conditions to which it has consented even if the city "could not have exacted many of these conditions," that a municipality can levy a rental fee equivalent to a tax when state legislation authorizes it to do so, as in *Broeckl v. Chicago Park District*, and that a municipality's ownership of public ways entitles it to regulate those ways for the benefit of the public, as in *People ex rel. Armanetti v. City of Chicago*. Regulate—and as we saw, a user fee can be a method of regulation—but not tax." (citing Illinois Broadcasting Co. v. City of Decatur, 238 N.E.2d 261, 265 (1968) ("exactions agreed to ... are not exactions")); *Lebron v. Sec'y, Fla. Dep't of Children & Families*, 710 F.3d 1202 (11th Cir. 2013) (highlighting the unilateral nature of an "exaction); *MCI Commc'ns Servs., Inc. v. City of Eugene, OR*, 359 F. App'x 692, 695 (9th Cir. 2009) (identifying an "exaction" as something compulsory); *Hill v. Kemp*, 478 F.3d 1236, 1245 (10th Cir. 2007) ("In the U.S., 'tax' is more generally applied in ordinary language to every federal, state, or local exaction of this kind." (citing 17 Oxford English Dictionary 677 (2d ed. 1989)); *Nat'l Cable Television Ass'n, Inc. v. F.C.C.*, 554 F.2d 1094, 1106 (D.C. Cir. 1976) (citing *State v. Gorman*, 41 N.W. 948 (Minn. 1889)); *Longshore v. U.S.*, 77 F.3d 440 (Fed. Cir. 1996); *City of Des Moines v. Iowa Tel. Co.*, 162 N.W. 323 (Iowa 1917) (aligning an "exaction" as something extracted pursuant to a municipality's governmental authority (i.e., a tax) as opposed to the municipality's proprietary authority); *Phone Recovery Services, LLC v. Qwest Corp.*, No. A17-0078 (Minn. Oct. 31, 2018); *Walton v. New York State Dep't of Corr. Servs.*, 921 N.E.2d 145, 151 (N.Y. 2009); *Bell Tel. Co. of Pa. v. Bristol Twp.*, 54 Pa. D. & C.2d 419 (Pa. Com. Pl. 1971) (treating an "exaction" as a "tax"); *Burns v. City of Seattle*, 164 P.3d 475, 487 (Wash. 2007) (en banc) (differentiating between taxes imposed by a regulatory authority and payments "voluntarily incurred in the context of a proprietary transaction"). *See also* Minn. Stat. § 645.44, subd. 19 (defining a tax as an exaction); RCW 35.21.860.

[55] II.A.2.

any way.[56] Providing for certain in-kind provisions in cable franchises has been and continues to be allowed under the Cable Act.[57] As shown in the Initial Comments, this has been the past practice for the past 34 years, and it has no impact on the deployment of cable, telephone, or broadband services.[58] It will, however, continue to have positive public impacts as shown herein.

5. PEG Capital Costs Are Determined through the Informal and Formal Cable Franchise Renewal Process.

The Industry Comments made several comments urging the FCC to change how PEG capital costs should be determined, including reconsidering prior FCC determinations.[59] This was not a subject of the FNPRM and is inappropriate for any rulemaking.[60] The Industry Comments seem to be complaining about PEG capital costs that members of the industry willing contracted to provide.[61] As described above, local franchising authorities do not mandate the terms of a cable franchise.[62] Those terms are either negotiated through contract negotiations or are proposed by a cable operator as part of the formal cable franchise renewal process.

6. The Proposed Interpretation of Section 622 Would Render Other Provisions of the Cable Act Meaningless.

Under the provisions of the Cable Act, a local franchising authority may receive a monetary franchise fee capped at 5% of the cable operator's gross revenues and additional

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[56] *See* Comments of NCTA at 39 & 45; Comments of ACA at 9; and Comments of Verizon at 3.
[57] *See, e.g.*, Cable Act at §§ 611(b), 622, 624 & 626.
[58] *See* Initial Comments at p. 21.
[59] NCTA Comments at p. 48; ACA Comments at p. 8.
[60] *See* Administrative Procedure Act of 1946, Pub. L. 79-404, 60 Stat. 237 (1946) ; 47 C.F.R. §§ 1.412 & 1.413(c).
[61] *See, e.g.*, NCTA Comments at pp. 43-45 (complaining of existing franchise provisions that cable operators willingly contracted to provide).
[62] II.A.2.

monetary PEG support.[63] Verizon argued that "Unless all in-kind assessments are included within the franchise fee cap, the cap itself would be meaningless."[64] However, including negotiated in-kind provisions as part of the franchise fee would actually render other sections of the Cable Act meaningless. Sections 611(b), 626, and 623 allow in-kind provisions in cable franchises and further allow a cable operator to recover these franchise requirements as part of a cable operator's rates.[65] The FCC's proposed franchise fee rule would render Section 626 (and countless cable franchises) superfluous and meaningless if the FCC were to adopt a rule contrary to the plain language of Section 622 and 34 years of past practice by allowing negotiated in-kind provisions to be off-set from franchise fee payments. Such a reading goes directly against the well-established rule of statutory construction that precludes interpretation that renders provisions of the statute superfluous.[66]

The Industry Comments also argued that, once negotiated, in-kind provisions can be excluded from the definition of franchise fee only if they are expressly excluded by the Cable Act.[67] This could result only from a tortured reading of the Cable Act. As shown in the Initial Comments, the analysis of whether negotiated in-kind provisions are part of the franchise fee starts and ends with how Congress defined franchise fee.[68] There is no presumption in the Cable Act that negotiated in-kind provisions are part of the franchise fee. The Industry Comments presume inclusion of negotiated in-kind provisions as part of the franchise fee and argue that

[63] *See, e.g.*, Cable Act at §§ 622 & 611(b).
[64] *See* Verizon Comments at p. 4.
[65] *See* Initial Comments at pp. 28-30. *See also* CAPA Comments at pp. 10-11; NATOA Comments at pp. 5-9.
[66] *See* Ratzlaf v. U.S., 510 U.S. 135 (1994).
[67] *See, e.g.*, NCTA Comments at pp. 45-47.
[68] *See* Initial Comments at pp. 21-26.

such provisions are excluded only if there is an express exclusion in the Cable Act.[69] Congress did not include a franchise fee exclusion for negotiated in-kind provisions because, as argued in the next section, it never intended such provisions to be franchise fees in the first place, which is why it allowed the recovery of these provisions through a separate section in the Cable Act.[70] The analysis argued by the Industry has no basis in the plain language of the Cable Act.

7. The Sparse Legislative History of Section 622 Provides No Support for the FCC's Tentative Conclusion.

The ACA Comments argued that the legislative history supports a determination that negotiated in-kind provisions should be considered part of the franchise fee.[71] However, as shown in the Initial Comments[72] and bolstered by *City of Dallas,*[73] the legislative history of Section 622 is sparse and indicates Congress never intended to deviate from the plain and ordinary usage of the words "assessment" and "imposed."[74] According to the House Report,

> Subsection 622(g)(2)(c) establishes a specific provision for PEG access in new franchises. ***In general, this section defines as a franchise fee only monetary payments made by the cable operator, and does not include as a 'fee ' any franchise requirements for the provision of services, facilities or equipment.*** As regards PEG access in new franchises, payments for capital costs required by the franchise to be made by the cable operator are not defined as fees under this provision. These requirements may be established by the franchising authority under section 611(b) or section 624(b)(1). In addition, any payments which a cable operator makes voluntarily relating to support of public, educational and governmental access and which are not required by the franchise would not be subject to the 5 percent franchise fee cap.[75]

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[69] *See, e.g.*, NCTA Comments at pp. 45-47.
[70] *See* Initial Comments at p. 29.
[71] *See* ACA Comments at pp. 8-9.
[72] *See* Initial Comments at p. 21.
[73] *See City of Dallas v. FCC*, 118 F.3d 393 (5th Cir. 1997).
[74] *See* Initial Comments at p. 21.
[75] *See* Cable Act House Report at 4702 (emphasis added).

The ACA Comments quoted only the last sentence and concluded that it must mean that all non-voluntary PEG support must be part of the franchise fee. However, reading the last sentence with the immediately preceding sentences, the only logical reading would conclude that Congress intended that franchise fees are monetary payments and that PEG support, including "the provision of services, facilities or equipment," whether contained in a cable franchise or voluntarily provided, are not franchise fees and therefore not subject to the 5% franchise fee cap. This conclusion is supported by many other Commenters in this proceeding, with whom we are in agreement.[76]

8. The FCC's Proposed Rule on the Franchise Fees Will Likely Have No Positive Impact on Broadband Deployment.

The Industry Comments suggest that changing the franchise fee rules may result in additional broadband deployment and innovation.[77] It would follow that areas of the country that currently charge less than the franchise fee cap would already see such additional deployment and innovation. But that is not the case. There are cities that charge much less than 5% franchise fee cap.[78] These cities have not seen better service, lower rates, or more deployment than other cities that charges a 5% franchise fee.[79] This should be no surprise.

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[76] *See e.g.*, Anne Arundel County *et al*. Comments; NATOA Comments; CAPA Comments; Comments of the League of Minnesota Cities, MB Docket No. 05-311 (Nov. 14, 2018); Comments of Wisconsin Community Media, MB Docket No. 05-311 (Nov. 14, 2018); Comments on Behalf of: the Association of Washington Cities *et al*., MB Docket No. 05-311 (Nov. 14, 2018).

[77] *See* NCTA Comments at p. 28.

[78] *E.g.*, City of Sioux Falls, South Dakota, *Cable System Franchise Renewal Agreement Between Midcontinent Communications and the City of Sioux Falls, South Dakota* at § 2.8 (2009) (limiting the franchise fee to 2.5% of Midcontinent's gross revenues), *available at* http://docs.siouxfalls.org/sirepub/cache/2/krxark431v0rmdqbk0khmaau/24480111122018094025383.PDF.

[79] *See compare id, with* City of Roseville, Minnesota, *Cable Television Franchise Ordinance* (2017) (limiting the franchise fee to 5.0% of Comcast's gross revenues), *available at* https://www.cityofroseville.com/AgendaCenter/ViewFile/Agenda/_10092017-22?packet=true.

Following the FCC's Wireless Order earlier in the year that preempted local authority under the premise it would increase broadband deployment, the industry has stated it would have no impact on deployment rates.[80] In fact, one industry participant said it planned on cutting back deployment.[81] One Industry Commenter has gone even so far as to suggest that the cost of any build-out terms (other than minimal build-out terms mandated by the Cable Act) must be deducted from the franchise fee.[82] Needless to say, such a rule would result in less – not more - broadband deployment. For example, the City of Renton, Washington identified areas of its City that were underserved by its cable operator and negotiated informally for service to those areas.[83] The result, which would be negated by the FCC's proposed rulemaking, was the expansion of broadband service in its City. Other than self-serving statements in the Industry Comments, there is nothing before the FCC that supports a rulemaking based on the premise that

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[80] *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79 (Rel. Sep. 27, 2018) (herein "2018 Wireless Order"). *See* Verizon Communications Inc., Q3 2018 Earnings Call Transcript (Oct. 23, 2018), *available at* https://seekingalpha.com/article/4213544-verizon-communications-inc-vz-q3-2018-results-earnings-call-transcript?part=single ("Yeah on the 5G rollout certainly we were glad to see the [2018 Wireless Order] around the small cell adoption, doesn't necessarily increase the velocity that we see. . . . I don't see [the Commission's rules] having a material impact to our [5G] build out plans."); Crown Castle International Corp., Q3 2018 Earnings Call Transcript (Oct. 18, 2018), *available at* https://seekingalpha.com/article/4212546-crown-castle-international-corp-cci-ceo-jay-brown-q3-2018-results-earnings-call-transcript?part=single ("So I wouldn't look at [the 2018 Wireless Order] and assume that we're going to see a material change in our 18 to 24 month deployment cycle. In fact, we don't believe that will result."). Despite Crown Castle's attempted recanter, earnings releases are regulated activities, and we find statements made in the course of such a regulated activity more likely to be truthful than those made by the Company's CEO on an unregulated social media platform.

[81] *See* Verizon Communications Inc., Q3 2018 Earnings Call Transcript (Oct. 23, 2018), *available at* https://seekingalpha.com/article/4213544-verizon-communications-inc-vz-q3-2018-results-earnings-call-transcript?part=single.

[82] *See* ACA Comments at p. 7.

[83] City of Renton, Washington, *Cable Franchise Agreement Between City of Renton, Washington and Comcast Cable Communication Management, LLC and Comcast Cable Holdings, LLC* at § 4 (2014), *available at* https://renton.civicweb.net/filepro/document/34953/Comcast%20ORD.pdf.

a rule essentially reducing the franchise fee will result in greater broadband deployment or lower costs to subscribers.[84] Indeed, under the dual regulatory structure of the Cable Act, cable operators have arguably built the most robust broadband networks in the country.[85]

B. Mixed Use Networks

1. Section 602(7)(C) Cannot Justify The FCC's Proposed "Mixed-Use" Ruling.

In our Initial Comments, the LFAs argued that the mixed use ruling the FCC proposes in the FNPRM is based on an invalid inference, from the "common carrier exception" to the definition of "cable system" in Section 602(7)(C) of the Cable Act, to the proposition that an incumbent cable operator's cable system is not subject to regulation by the local franchising authority if it carries broadband Internet access or other non-cable services as well as cable service.[86] The inference, we noted, comes in ¶ 26 of the FNPRM:

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[84] *See* Verizon Communications Inc., Q3 2018 Earnings Call Transcript (Oct. 23, 2018), *available at* https://seekingalpha.com/article/4213544-verizon-communications-inc-vz-q3-2018-results-earnings-call-transcript?part=single ("Yeah on the 5G rollout certainly we were glad to see the [2018 Wireless Order] around the small cell adoption, doesn't necessarily increase the velocity that we see. . . . I don't see [the Commission's rules] having a material impact to our [5G] build out plans."); Crown Castle International Corp., Q3 2018 Earnings Call Transcript (Oct. 18, 2018), *available at* https://seekingalpha.com/article/4212546-crown-castle-international-corp-cci-ceo-jay-brown-q3-2018-results-earnings-call-transcript?part=single ("So I wouldn't look at [the 2018 Wireless Order] and assume that we're going to see a material change in our 18 to 24 month deployment cycle. In fact, we don't believe that will result."). *See also* Comcast Corporation, Form 10-K (2017) ("We expect programming expenses for our video services to continue to be our Cable Communications segment's largest single expense item and to increase for the foreseeable future. . . . *If we are unable to raise our customers' rates or offset programming cost increases through the sale of additional services or cost management initiatives, the increasing cost of programming could have an adverse effect on our Cable Communications segment's results of operations*." (emphasis added)), *available at* https://www.cmcsa.com/encrypt/files?file=nasdaq_kms/assets/2018/02/01/7-33-55/2017%20Annual%20Report%20on%20Form%2010K.pdf&file_alias=53531.

[85] *See* Initial Comments at p. 13 (citing *In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2018 Broadband Deployment Report, 33 F.C.C. Rcd. 1660, 1680 (2018)).

[86] *See* Initial Comments at pp. 43-51.

> Under Section 3(51) of the Act, a "provider of telecommunications services" is a "telecommunications carrier," which the statute directs "shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services. *Thus, an incumbent cable operator, to the extent it offers telecommunications service, would be treated as a common carrier subject to Title II of the Act.* Section 602(7)(C) of the Act, in turn, excludes from the term "cable system" "a facility of a common carrier which is subject, *in whole or in part,* to the provisions of title II of this Act, except that such facility shall be considered a cable system … to the extent such facility is used in the transmission of [cable service].[87]

The FCC's evident reasoning is that if common carrier facilities subject to Title II are excluded from "cable system," then of course an incumbent cable operator providing telecommunications services over its cable system should "in turn" be treated as a Title II common carrier not subject to LFA regulation under Title VI. This argument has multiple problems, as we set forth in our Initial Comments[88] and discuss further below. First, it is a non-sequitur: It does not follow from an exception expressly incorporated in Section 602(7)(C) for common carriers, that a counterpart exception, expressly stated nowhere in Title VI or anywhere else in the Communications Act, should apply to incumbent cable operators delivering telecommunications or other non-cable services over their cable systems.

The common carrier exception is plainly stated in the statute; the other, the FCC's mixed-use rule, is not, and that is all the difference in the world. Again, the crux of the Commission's analysis, Section 602(7)(C), relates to *Title II facilities.* A cable operator that is not a common carrier cannot be impacted by that section,[89] and it cannot be the basis for derogating LFA authority to regulate non-cable services delivered over the incumbent's network.

Secondly, the FCC's incorrect inference ignores Congress' reasons for adopting the common carrier exception, clearly stated in the legislative history, and unrelated to the question

[87] FNPRM at ¶ 26 (emphasis added).
[88] *See* Initial Comments at pp. 43-51.
[89] *See* Anne Arundel County *et al*. Comments at pp. 41-42.

whether LFAs should be able to regulate non-cable services delivered by an incumbent cable operator over a cable network.[90] And it ignores differences between Title II and Title VI of the Communications Act that are directly relevant to the scope of LFA regulatory authority.[91] Section 602(7)(C), the crux of the FCC's argument, defines "cable system" and excepts from "cable system" the "facility of a common carrier which is subject, in whole or in part," to regulation under Title II. The broadband Internet access service at issue in this proceeding is not a Title II telecommunications service, so by its terms, the "common carrier" exception does not apply to that service. But even assuming it were a Title II service, the fact that an incumbent cable operator offers the service over its cable system cannot transform the cable system itself into a Title II facility subject to the common carrier exception. The difference between Title II and Title VI is essential in this regard. Under common carrier law, the service, not the facility, is the focus of regulation, as argued in the Anne Arundel *et al*. Comments.[92] As explained in our Initial Comments, Title VI, to the contrary, focuses on the facility, by defining a "cable system" as a communications system that has particular characteristics (e.g. closed transmission pathways, specifically limited interaction) and that is "designed to provide cable service which includes video programming."[93] The cable system is a cable system if it satisfies the defining

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[90] *See* Cable Act House Report at 4693; Initial Comments at pp. 50-51 (showing that Congress' stated objective in articulating the common carrier exception was not to relieve cable operators from alleged burdens of LFA regulation of their cable systems to provide broadband internet access, which did not yet exist as a commercial market, but rather to achieve competitive equity between Title II telephone companies and cable operators).

[91] *See* Anne Arundel County *et al*. Comments at p. 41 ("A cable system remains a 'cable system' under Section 602, even when it is used to provide non-cable services, such as information services." (citing NCTA Ex Parte Letter, WC Docket No. 17-84 (June 11, 2018))).

[92] *Id* ("[A] common carrier is such by virtue of his occupation' … one can be a common carrier with regard to some activities but not others. . . . a telecommunications service is defined 'regardless of the facilities used.' . . . The Supreme Court has confirmed, '[a] cable system may operate as a common carrier with respect to a portion of its service only.'" (citations omitted)).

[93] Cable Act at § 602(6).

characteristics of such a communications system, regardless of whether it is used for non-cable, non-Title VI services.[94] LFA authority to regulate goes with the system – the Cable Act grants authority to LFAs to regulate a communications *system*, in accordance with the Cable Act if it is a cable system.[95] A common carrier facility is subject to Title II to the extent it offers Title II *services*, regardless of the nature of the facility; and the facility of an incumbent cable operator can be used to provide Title II services without thereby being converted into a common carrier facility excepted from "cable system" that must be regulated under Title II and cannot be regulated by LFAs under Title VI[96] or sources of local authority outside the Cable Act, such as their police powers and state statutory or common law authority to regulate use of the public rights of way.[97]

2. The Industry's Call For Preemption Of All LFA Authority To Regulate Incumbent Cable Systems That Carry Non-Cable Services Has No Basis In The Cable Act And Should Be Rejected.

As noted in our Initial Comments, the FNPRM is ambiguous as to whether the proposed mixed-use rule is intended to preempt all LFA authority to regulate an incumbent provider's cable system to the extent that it carries non-cable service, or is intended to state that LFAs cannot undertake such regulation pursuant to their Title VI authority.[98] The industry's comments, notably the comments of NCTA, evidence no such ambiguity, clearly calling on the FCC to adopt a mixed-use rule that preempts all LFA authority to regulate either non-cable

[94] Indeed, the drafters of the Communications Act acknowledged that a cable system remains a cable system even when it carries non-cable services. *See* Cable Act House Report at 4700.
[95] Cable Act at § 621(a)(2).
[96] Anne Arundel County *et al*. Comments at p. 41.
[97] *See* Initial Comments at pp. 43-51.
[98] *See* Initial Comments at p. 44. *See also* NATOA Comments at pp. 13-15. The LFAs endorse NATOA's call for clarification. *Id*.

services provided by an incumbent operator, or the cable system – the facilities and equipment – that are used to deliver them. For example:

> Section 621 and multiple reinforcing provisions of Title VI prohibit franchising authorities from regulating the provision of any service offered over the cable systems of cable operators, other than cable service. Consistent with its tentative conclusion, the Commission should find that the mixed-use rule prohibits franchising authorities from regulating non-cable services when offered by cable operators that are not common carriers, *and from regulating the facilities or equipment used to offer those services*. It should further make clear that this prohibition on regulation extends not only to cable franchise agreements and their renewals, but to all franchising authority attempts to regulate these services, and to attempts to regulate these services under any other purported source of authority, even when states and localities claim not to be acting as franchising authorities.[99]

This is not a request for clarification as to the scope of what Title VI authorizes LFAs to regulate. It is an industry call for a mixed-use rule that prohibits all LFA regulation of a cable system that carries non-cable service, whether operated by a common carrier or an incumbent cable operator.[100] NCTA argues at considerable length for the proposition that cable systems can and do carry both cable services and non-cable services,[101] and for the further proposition that adding broadband Internet service and other non-cable services to a cable system imposes no incremental burden on the public rights of way or LFA regulation thereof,[102] presumably because

[99] NCTA Comments at pp. 7-8 (emphasis added). *See also* Verizon Comments at pp. 6-9; ACA Comments at pp. 9-16.

[100] Verizon additionally enjoins the Commission to "take this opportunity to confirm that over-the-top video distributors are immune from legacy cable regulations because they are not 'cable operators' and do not provide a 'cable service' over a 'cable system'," because "[c]onsistent with ruling that LFAs may not regulate non-cable services." Verizon Comments at p. 9. The LFAs note that this issue is nowhere raised or discussed in the FNPRM and is not before the Commission in this proceeding. It is entirely inappropriate that the Commission accede to Verizon's request and it should not do so. *See* Administrative Procedure Act of 1946, Pub. L. 79-404, 60 Stat 237 (1946); 47 C.F.R. §§ 1.412 & 1.413(c). Although it is impermissible for the FCC to enact rule changes without prior public notice, such instances are limited to situations where "notice and public procedure are impracticable, unnecessary, or contrary to the public interest." *Id*. Verizon has failed to show that these requirements have been satisfied.

[101] NCTA Comments at pp. 6-36.

[102] NCTA Comments at pp. 22-23.

the same facilities and equipment carry both cable and non-cable services.[103] To the extent the latter is indeed NCTA's position, the industry is asking that the "facilities and equipment" comprising cable systems be excused from all LFA regulation if they carry non-cable services as well as cable services. That is a remarkable overreach. If the FCC were to follow this directive, it would preempt LFA regulation of the cable system's occupancy of the rights-of-way and its placement of equipment in the ROW, and it would preempt the regulation of cable facilities and equipment that is permitted under Title VI.[104] The first, to take the obvious example in a proceeding about broadband Internet access service, would leave cable operators free to deploy small cell networks on their facilities in the ROW with no regulation as to location, size, numbers, safety, engineering characteristics, or any other aspect of the antennas, cabinets, and equipment comprising them – even as permitted under the FCC's recent Wireless Infrastructure Order.[105] And it would preempt not only "attempts to regulate" under Title VI, but also – NCTA's words – attempts to regulate "under any other purported source of authority, even when states and localities claim not to be acting as franchising authorities."

The Cable Act provisions cited by NCTA do not support this total preemption of local authority over cable systems. According to NCTA, "Since 1984, Section 621(a)(2) has given every franchised cable operator the right to build and operate a cable system for mixed use in the public rights-of-way," the point being that LFAs are prohibited from regulating such "as of right" use of the ROW. In fact, Section 621(a)(2) provides that "[a]ny franchise shall be construed to authorize the construction of a cable system over public rights-of-way." This is an authorization to construct a cable system in the ROW, subject to the grant of a franchise. It

[103] NCTA Comments at n. 80.
[104] Cable Act at §§ 624 & 636.
[105] *See* Initial Comments at p. 45.

says nothing about mixed-use networks, the provision of non-cable services over the cable system, or whether LFAs can regulate the system's use of the ROW, as cable franchises commonly provide they can.

According to NCTA, "Section 621(b)(3)(B) bars a state or locality from leveraging its Title VI franchising authority to "prohibit[], limit[], restrict[], or condition[]" the provision of a telecommunications service by a cable operator."[106] In fact, this section provides that "A franchising authority may not impose any requirement *under this subchapter* that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof."[107] Adding back the italicized words, omitted by NCTA, shows the provision is intended to articulate the authority available to an LFA under the Cable Act, and not as the categorical bar to all regulation of a cable operator's provision of telecommunications service over the cable system that NCTA wants the FCC to find. The provision says nothing about the application of LFA authority derived from local government police powers or state statutory or common law authority, or from any other non-Title VI source. And in fact, local authority to regulate a cable system's use of the rights-of-way does derive from state statutory and common law, as the LFAs explained in detail in Initial Comments.[108]

According to NCTA, "Section 624(b)(1) explicitly states that, in connection with a cable television franchise renewal, a "franchising authority, to the extent related to the establishment or operation of a cable system . . . may not . . . establish requirements for video programming or *other information services*," and (since the FCC's construction of "information service" is

[106] NCTA Comments at p. 12.
[107] Telecommunications Act of 1996 at § 303(e), Pub. L. 104-104, 110 Stat. 56, 124 (emphasis added) (herein "Telecommunications Act of 1996").
[108] Initial Comments at pp. 5-19, 43-51.

correct) "[t]he statute therefore *plainly bars franchising authorities from regulating the provision of [broadband internet access service]* [foregoing emphasis added] and other information services by cable operators."[109] In fact, Section 624 provides that the franchising authority "*in its request for proposals for a franchise* … may establish requirements for facilities and equipment but … may not establish requirements for video programming or information services …" [110] Again, even assuming the FCC's construction of "other information services" is correct,[111] this provision articulates what an LFA can and can't do in its RFP for a franchise, i.e. pursuant to its franchising authority under Title VI. It says nothing about the LFA's power to regulate "information services" under other sources of authority, such as local police powers and state statutory or common law grants of ROW regulation authority, and so does not constitute the global "bar" to LFA regulation that NCTA claims.

According to NCTA, "As amended in 1996, Section 624(e) prohibits state and local governments from limiting the use of particular transmission technologies or subscriber equipment by cable systems, in order to avoid "the patchwork of regulations that would result from a locality-by-locality approach." As stated in the title of this section of its Comments, this purportedly shows that "[t]he Communications Act bars franchising authority regulation of non-cable facilities or equipment." But a limit on an LFA's Title VI authority to prescribe transmission technologies is very far from being the global bar to LFA regulation of cable systems carrying non-cable services, including right-of-way regulation, that NCTA seeks.

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[109] NCTA Comments at pp. 11-12 (emphasis added).
[110] Cable Act at § 624 (emphasis added)
[111] Note that Section 624(b)(2) immediately following provides that the LFA "may enforce any requirements contained within the franchise-- … (B) for broad categories of video programming and other services." Since "other services" would include information services in the sense of Internet access service, this goes directly against the FCC's construction of Section 624(b)(1) as barring LFA requirements on such services.

It is clear from this review of its cited Cable Act authority that NCTA overreaches in calling on the FCC to adopt a ruling that preempts all local regulation of incumbent cable networks that carry non-cable services, simply because they carry such services. The FCC should respect the plain language of the Cable Act and reject NCTA's call.

C. The Cable Act Does Not Authorize the Commission to Preempt State Franchising Actions and Regulations as Proposed in the NPRM

As previously discussed in the Initial Comments, the Cable Act does not grant the Commission the authority necessary to preempt state and local law as proposed in the NPRM.[112] To the contrary, the Cable Act expressly recognizes and does not disturb state and local franchising authority.[113] Nevertheless, NCTA and Verizon claim that the Commission must expressly preempt state franchising actions and regulations because: (1) the Commission's regulations would not otherwise take effect and (2) disparate state regulations cause an undue regulatory burden on cable operators. Both of these claims are inaccurate, illogical, and without merit.

First, NCTA claims that unless the Commission expressly preempts state franchising actions and regulations, any Commission regulation affecting franchise fees or mixed-use networks would fail to take effect.[114] If, *arguendo*, the Commission possessed the necessary authority to enact its proposed regulations, these regulations would clearly preempt state franchising actions and regulations under the Supremacy Clause.[115] NCTA has failed to cite any evidence or offer even a bald statement as to how the Commission's regulations would fail to preempt state franchising actions and regulations. Instead, NCTA appears to be seeking plenary

[112] Initial Comments at pp. 51-56.
[113] *Id*.
[114] NCTA Comments at pp. 62-64.
[115] U.S. CONST. art. vi, cl. 2.

preemption of state franchising actions and regulations beyond the NPRM's scope in an effort to collaterally eliminate or further reduce a telecommunications provider's costs while also improperly limiting state and local authority to manage the rights-of-way.[116]

Regardless, as previously discussed in the Initial Comments, the Commission does not possess requisite authority to promulgate its proposed regulations. The Commission cannot use its Title I or Title II authority to enact Title VI regulations.[117] Perhaps recognizing this point, NCTA has conflated these multiple sources of Commission authority in an attempt to rationalize the Commission's otherwise improperly proposed actions.[118] For example, NCTA cites a Texas statute as requiring $25 million per year in right-of-way fees from cable operators to provide voice services.[119] NCTA posits that this statute is exemplary of the unreasonable nature of franchising authorities to demand "in-kind exactions above and beyond payment of a five percent franchise fee."[120] Not only is this $25 million amount not expressed by Texas law, but these fees do not apply to cable operators and are therefore beyond the Cable Act's purview.[121] Followed to its logical conclusion, NCTA is essentially claiming that if a telecommunications service provider complies with Title VI, the service provider is automatically exempt from every other provision of the Communications Act (i.e., regulation of cable services precludes parallel

[116] NCTA Comments at p. 35.
[117] Initial Comments at pp. 55-56.
[118] NCTA Comments at p. 63.
[119] *Id*.
[120] *Id* at p. 42.
[121] Telecommunications Act of 1996 at § 651(a)(2) ("To the extent that a common carrier is providing transmission of video programming on a common carrier basis, such carrier shall be subject to the requirements of subchapter II and section 572 of this title, but shall not otherwise be subject to the requirements of this subchapter."). Tex. Local Government Code § 283.002(2) (1999) ("'Certificated telecommunications provider' means a person who has been issued a certificate of convenience and necessity, certificate of operating authority, or service provider certificate of operating authority by the commission *to offer local exchange telephone service or a person who provides voice service*." (emphasis added)); 16 Tex. Admin. Code § 26.467 (2003). *See* II.B.

regulation of information services).[122] This is clearly untrue and contrary to all sources of applicable law.[123]

Second, Verizon claims that it is confusing and unduly burdensome for cable operators to comply with disparate state regulations, citing the Commission's reasoning found in the *Second Report and Order*.[124] As previously discussed in the Initial Comments, the Cable Act recognizes and encourages the existence of state franchising actions and regulations in order to more effectively address local and hyperlocal cable franchising issues.[125] It is simply neither feasible nor practical for the federal government to address these diverse issues in a uniform manner.[126] Moreover, the *Second Report and Order* language cited by Verizon was not only vacated by the *Montgomery County* court, but Verizon also mischaracterizes this language.[127] This language only addresses *when* new cable franchise regulations should take effect (i.e., regulations should immediately apply to all franchises, not individually applied to a franchise after renewal).[128] The Commission language cited by Verizon does not address, discuss, or even contemplate the Commission's dual regulatory system.[129]

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[122] Telecommunications Act of 1996 at § 303(a)(3)(A)(ii) ("If a cable operator or affiliate thereof is engaged in the provision of telecommunications services . . . the provisions of this title shall not apply to such cable operator or affiliate for the provision of telecommunications services.").
[123] *See* II.B.
[124] Verizon Comments at p. 12 (citing *In the Matter of Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act of 1984 As Amended by the Cable Television Consumer Prot. & Competition Act of 1992*, 22 F.C.C. Rcd. 19633, 19642 (2007) (herein "Second Report and Order")).
[125] Initial Comments at p. 51-56.
[126] *Id*.
[127] *Montgomery County, Maryland v. FCC*, 863 F.3d 485 (2017). Verizon Comments at p. 12.
[128] Second Report and Order at 19642 ("We do not see, for example, how Section 622 could mean different things in different sections of the country *depending on when various incumbents' franchise agreements come up for renewal*." (emphasis added)).
[129] *Id*. *See* Initial Comments at p. 7.

Furthermore, it is simply untrue that disparate state regulations have imposed an undue burden on Verizon. Not only does Verizon fail to cite any evidence supporting this position, but, under the current "burdensome" regulatory landscape, Verizon has instead developed a robust portfolio of cable systems throughout the United States.[130] These cable systems have been additionally leveraged to deliver non-cable services, dramatically increasing the revenue derived from a single set of telecommunications facilities constructed pursuant to a cable franchise.[131] As a result, Verizon has tripled its annual net income since 2010.[132] It is clear that the current regulatory landscape has not "[led] to confusion among . . . franchisees" as Verizon has suggested or imposed undue regulatory burdens that obstruct the cable franchising process.[133] While the Cable Act does not grant the Commission authority to preempt state franchising actions and regulations as proposed in the NPRM, neither NCTA's nor Verizon's claims hold any merit, and neither party provides any semblance of support for their claims. It is simply

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[130] Moreover, whether a law or regulation is unduly burdensome is a question of law that would be inappropriate for the Commission to decide. *See U.S. v. Lopez*, 514 U.S. 549 (1995). *See also Klebe v. U.S.*, 263 U.S. 188 (1923) (implying the presence of a bargain-for contract based on the parties' conduct).

[131] Verizon Communications Inc., *Form 10-K* (2017) (". . . building out multi-use fiber to expand the future capabilities of both our wireless and wireline networks while reducing the cost to deliver services to our customers and pursuing other opportunities to drive operating efficiencies.").

[132] *See, e.g.*, Philadelphia, Pennsylvania, Cable Franchise Agreement Between City of Philadelphia and Comcast of Philadelphia, LLC, Comcast of Philadelphia II, LLC (2015), available at https://phila.legistar.com/View.ashx?M=F&ID=4160967&GUID=CFA9C658-6CBE-4521-BAF1-6A3F47C06C25. In 2010, Verizon reported a net income of $10,217,000,000 ($11,491,680,000 adjusted for CPI inflation) and a net income of $30,550,000,000 in 2017. Verizon Communications Inc., *Condensed Consolidated Statements of Income* (2017), *available at* https://www.verizon.com/about/file/25553/download?token=az7JPvqO; Verizon Communications Inc., *Condensed Consolidated Statements of Income* (2011), *available at* https://www.verizon.com/about/file/889/download?token=LlpPvF0l.

[133] Verizon Comments at p. 12. Verizon also states that consumers will be harmed by disparate state regulations but fails to support this statement. It is unclear how state regulations designed to more effectively address local and hyperlocal cable franchising issues will harm consumers. Verizon Comments at p. 12. *See* Anne Arundel County *et al*. Comments at p. 45; Comments of Wisconsin Community Media at p. 4, MB Docket No. 05-311 (filed Nov. 14, 2018).

inaccurate and illogical to claim that: (1) validly enacted federal regulations are subservient to state and local law and (2) disparate state regulations cause an undue regulatory burden on cable operators. These claims are unsupported by evidence and are incorrect as a matter of law. Instead, NCTA and Verizon invoke the nebulous falsity of unreasonable state franchising actions and regulations that impede cable franchising despite the fact that cable operators across the country continue to report ever-increasing revenues. There is a clear disconnect between NCTA's and Verizon's claims and observed reality. Thus, the Commission should find neither of these claims persuasive, and the Commission cannot rely on its Cable Act authority to preempt state franchising actions and regulations as proposed in the NPRM.

III. CONCLUSION.

For the foregoing reasons, the Commission should refrain from adopting the proposed rules relating to franchise fees, mixed-use networks and state preemption.

Respectfully submitted,

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EXHIBIT A. DECLARATION OF THOMAS G. ROBINSON